RANJIT KAUR S GOPAL SINGH

v.

HOTEL EXCELSIOR (M) SDN BHD

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDUL MALIK ISHAK JCA
WAN ADNAN MUHAMAD JCA
[CIVIL APPEAL NO: W-04-157-02]
14 AUGUST 2009

CIVIL PROCEDURE: *Pleadings - Issue not pleaded - Whether court ought to ignore issues not pleaded - Whether parties bound by their pleadings*

LABOUR LAW: *Industrial Court - Award - Jurisdictional errors - Acting on an unpleaded issue - Finding made in the absence of positive proof - Misdirecting on the standard of proof - Whether award ought to be quashed*

LABOUR LAW: *Industrial Court - Duty of court - Duty to act according to equity, good conscience and substantial merits of case without regard to technicalities and legal form - Extent of such duty - Whether Industrial Court free to disregard the Industrial Court Rules in the execution of such duty - Industrial Relations Act 1967, s. 30(5) - Industrial Court Rules 1967*

LABOUR LAW: *Industrial Court - Finding of fact - Finding based on unpleaded issue - Whether Industrial Court ought not to consider issues not raised in pleadings - Whether award of Industrial Court based on unpleaded issue ought to be quashed*

LABOUR LAW: *Employment - Dismissal - Doctrine of condonation, extent and application of*

The employee was dismissed after a domestic enquiry found her guilty on charges related to insubordination, tardiness and failure to promptly submit medical chits. The dismissal was referred to the Industrial Court which found that the employee was dismissed without just cause or excuse, on *inter alia* the basis that there had been a 'possibility of victimization'. The High Court quashed the award of the Industrial Court and the employee thus appealed to the Court of Appeal.

Held (dismissing the appeal with costs):
Per Low Hop Bing JCA:

(1) The Industrial Court's duty to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form under s. 30(5) of the Industrial Relations Act 1967, does not give it the complete freedom to ignore the Industrial Court Rules 1967 made under the Industrial Relations Act 1967. Section 30(5) of the Act merely allows the Industrial Court to disregard technicalities and legal form. Rule 9(3) of the Rules specifically prescribes the contents of a statement of case, which contents are matters of substance. *Superintendent of Lands And Surveys (4th Div.) & Anor v. Hamit bin Matusin & Ors* (dist); *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd* (dist); *R Rama Chandran v. Industrial Court of Malaysia & Anor* (foll); *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh* (foll). (paras 19, 20, 21, 22, 23 & 24)

(2) In the instant case, the issue of victimization was not pleaded at all. Neither did it appear to be within the contemplation of the employee. Further, a careful examination of the Industrial Court's award showed that there was no evidence to support the unpleaded issue of victimization. The Industrial Court had thus gone on a frolic of its own in finding that the employee had been victimized. It was manifestly wrong for the Industrial Court to embark on the 'possibility' of victimization when it should have been concerned with a 'balance of probabilities'. The Industrial Court had clearly occasioned three specific jurisdictional errors, *viz*: (i) acting on the unpleaded issue of victimization; (ii) finding the possibility of victimization in the absence of positive proof; and (iii) misdirecting on the standard of proof by reference to a 'possibility' instead of a 'balance of probabilities'. (paras 27, 28 & 29)

Per Abdul Malik Ishak JCA:

(1) In considering whether there was victimisation, the Industrial Court had erroneously relied upon an unpleaded fact. Parties are bound by the pleadings. The court is not entitled to decide a suit on a matter which is not pleaded. The trial of a suit is solely confined to the pleadings. Since the issue of victimisation ought not to have been considered by the Industrial Court, the

High Court had acted within its jurisdiction in issuing an order of *certiorari* to quash the decision of the Industrial Court. *Yew Wan Leong v. Lai Kok Chye* (refd). (paras 38, 39 & 45)

(2) The High Court was correct in holding that the Industrial Court had misapplied the doctrine of condonation. In the instant case, condonation would only come into play if the employer had been fully aware of the employee's late coming to work and yet elected to do nothing about it. Here, the employer had adduced evidence to show that the employee had been warned about her tardiness. Thus, the erroneous application of the doctrine of condonation by the Industrial Court amounted to an error of law that entitled the High Court to make an order of *certiorari*. (paras 53

(3) The common law doctrine of condonation is connected to and is also termed a waiver. Condonation is essentially the employer excusing his employee and dispensing with his (employer's) right to punish the employee for misconduct or a breach of duty. The employee is entitled to plead the employer's abandonment of his contractual right to discipline the employee if the employer attempts to reassert that right. Condonation only arises after the employer acquires full knowledge of the nature and circumstances of the employee's offence. *Banning v. Wright (Inspector of Taxes)* (refd). (paras 54, 55, 56, 57, 58 & 59)

Bahasa Malaysia *Translation Of Headnotes*

Pekerja telah dibuang kerja selepas suatu siasatan domestik telah memutuskan beliau bersalah atas pertuduhan-pertuduhan berhubung dengan ingkar perintah, kelewatan dan kegagalan untuk menyerahkan surat-surat perubatan dengan segera. Pembuangan kerja itu dirujukkan ke Mahkamah Perusahaan yang mendapati bahawa pekerja dibuang kerja tanpa sebab atau alasan adil, atas, antara lain, dasar bahawa terdapat 'kemungkinan pemangsaan'. Mahkamah Tinggi membatalkan award Mahkamah Perusahaan dan pekerja oleh yang demikian merayu ke Mahkamah Rayuan.

Diputuskan (menolak rayuan dengan kos):
Oleh Low Hop Bing HMR:

(1) Kewajipan Mahkamah Perusahaan untuk bertindak mengikut ekuiti, perasaan hati betul dan merit-merit kes yang cukup banyak tanpa mengendahkan keteknikan-keteknikan dan tatacara di sisi undang-undang di bawah s. 30(5) Akta Perhubungan Perusahaan 1967, tidak memberinya kebebasan sepenuhnya untuk tidak menghiraukan Kaedah-kaedah Mahkamah Perusahaan 1967 yang dibuat di bawah Akta Perhubungan Perusahaan 1967. Seksyen 30(5) Akta hanya membenarkan Mahkamah Perusahaan untuk tidak mempedulikan keteknikan-keteknikan dan tatacara di sisi undang-undang. Kaedah 9(3) Kaedah-kaedah menyatakan secara khusus kandungan suatu pernyataan kes, di mana kandungannya merupakan perkara-perkara bersusbtans. *Superintendent of Lands And Surveys (4th Div.) & Anor v. Hamit bin Matusin & Ors* (dibezakan); *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd* (dibezakan); *R Rama Chandran v. Industrial Court of Malaysia & Anor* (diikuti); *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh* (diikuti).

(2) Dalam kes semasa, isu pemangsaan tidak diplid langsung. Ia juga nampaknya tidak difikirkan pekerja. Lagipun, sesuatu pengkajian teliti award Mahkamah Perusahaan menunjukkan bahawa tidak ada keterangan untuk menyokong isu pemangsaan yang tidak diplid. Mahkamah Perusahaan oleh itu telah menggunakan pertimbangannya sendiri untuk memutuskan bahawa pekerja telahpun dijadikan mangsa. Ia nyata bersalah bagi Mahkamah Perusahaan untuk menimbangkan 'kemungkinan' pemangsaan apabila ia sepatutnya memikirkan tentang 'imbangan kebarangkalian'. Mahkamah Perusahaan telah melakukan tiga kekhilafan bidang kuasa yang khusus, iaitu: (i) bertindak atas isu pemangsaan yang tidak diplid; (ii) mendapati kemungkinan pemangsaan apabila tiada bukti positif; dan (iii) menyalaharahkan atas standard bukti dengan merujuk kepada 'kemungkinan' dan bukan 'imbangan kebarangkalian'.

Oleh Abdul Malik Ishak HMR:

(1) Dalam menimbangkan sama ada pemangsaan berlaku, Mahkamah Perusahaan telah secara khilaf bergantung pada fakta yang tidak diplid. Pihak-pihak diikat oleh pliding-pliding. Mahkamah tidak berhak menentukan sesuatu guaman

berdasarkan perkara yang tidak diplid. Perbicaraan satu guaman hanya dihadkan kepada pliding-pliding. Oleh kerana isu pemangsaan tidak seharusnya dipertimbangkan oleh Mahkamah Perusahaan, Mahkamah Tinggi telah bertindak dalam bidang kuasanya dengan mengeluarkan perintah *certiorari* untuk membatalkan keputusan Mahkamah Perusahaan. *Yew Wan Leong v. Lai Kok Chye* (dirujuk).

(2) Mahkamah Tinggi betul apabila mendapati bahawa Mahkamah Perusahaan telah salah pakai doktrin pemaafan. Dalam kes semasa, pemaafan hanya akan bangkit jika majikan sedar sepenuhnya bahawa pekerja masuk kerja lewat dan memilih untuk tidak berbuat apa-apa mengenainya. Di sini, majikan telah mengemukakan keterangan untuk menunjukkan bahawa pekerja telah diberi amaran tentang kelewatannya. Oleh itu, penggunaan salah doktrin pemaafan oleh Mahkamah Perusahaan merupakan suatu kekhilafan undang-undang yang memberikan Mahkamah Tinggi hak untuk membuat perintah *certiorari*.

(3) Doktrin common law pemaafan berhubung dengan dan juga dipanggil penepian. Pemaafan ialah sebenarnya majikan memaafkan pekerjanya dan menolak haknya untuk menghukum pekerja atas salah laku atau pelanggaran kewajipan. Pekerja berhak untuk memplid pembatalan hak kontraktual majikan untuk mendisiplinkan pekerja jika majikan cuba menegaskan kembali hak itu. Pemaafan hanya berbangkit selepas majikan memperolehi pengetahuan penuh sifat dan keadaan-keadaan kesalahan pekerja. *Banning v. Wright (Inspector of Taxes)* (dirujuk).

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 6 CLJ 473 CA ***(refd)***

Anjalai Ammal & Anor v. Abdul Kareem [1968] 1 LNS 8 FC ***(refd)***

Banning v. Wright (Inspector of Taxes) [1972] 1 WLR 972 ***(refd)***

Beattie v. Parmenter [1888-89] 5 TLR 396 ***(refd)***

Bremer Handelsgesell-Schaft Schaft MBH v. Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep 109 ***(refd)***

Central London Property Trust Limited v. High Trees House Limited [1947] 1 KB 130 ***(refd)***

Clouston & Co, Limited v. Corry [1906] AC 122 ***(refd)***

Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***

Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 LNS 30 ***(refd)***

Hari Chand v. Daulat Ram AIR [1987] SC 94 ***(refd)***

K Kanakarathnam v. A Perumal and another AIR [1994] Mad 247 ***(refd)***
Koh Siak Poo v. Sayang Plantation Bhd [2002] 1 CLJ 501 CA ***(refd)***
Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 CA ***(foll)***
Lever Brothers, Limited, And Others v. Bell And Another [1931] 1 KB 557 ***(refd)***
Lucas v. Premier Motors Ltd [1928] 4 DLR 526 ***(refd)***
LW Middleton v. Harry Playfair AIR [1925] Calcutta 87 ***(refd)***
Meyrick v. Stirling Bros, Limited [1899-1901] 1-3 WAR 51 ***(refd)***
Milan Auto Sdn Bhd v. Wong Seh Yen[1995] 4 CLJ 449 FC ***(refd)***
Muniandy & Anor v. Muhammad Abdul Kader Muhd Saheed & Ors [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116 SC ***(refd)***
Narayanan Ponnusamy v. Kannamah Ponnusamy [1993] 4 CLJ 389 HC ***(refd)***
National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam) [2000] 1 CLJ 681 CA ***(dist)***
Phillips v. Foxall [1871-72] 7 LR QB 666 ***(refd)***
Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 HC ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(foll)***
Ram Sarup Gupta (dead) by L Rs v. Bishun Narain Inter College and others, AIR [1987] SC 1242 ***(refd)***
Ria Enterprise & Ors v. MBF Finance Bhd [2001] 1 CLJ 687 HC ***(refd)***
S Manickam & Ors v. Ismail Mohamad & Ors [1996] 1 LNS 117 HC ***(refd)***
Superintendent of Lands And Surveys (4th Div.) & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(dist)***
Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 HC ***(refd)***
The Chartered Bank v. Yong Chan [1974] 1 LNS 178 ***(refd)***
The Federal Supply And Cold Storage Company Of South Africa (Limited) v. Angehrn And Piel [1909-1910] 26 LT 626 ***(refd)***
The Manager, Scudai Estate, Johore Bahru v. Narayanan [1960] 1 LNS 149 HC ***(refd)***
Vinod Kumar Arora v. Smt Surjit Kaur AIR [1987] SC 2179 ***(refd)***
Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan [1986] 1 LNS 46 ***(refd)***
Wong See Leng v. C Saraswathy Ammal [1954] 1 LNS 133 ***(refd)***
Yeung Chee-Kiu v. Lam Chee Trading As Yau Fat Furniture Co [1966] HKD CLR 65 ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)
Industrial Court Rules 1967, r. 9(1), (3)
Industrial Relations Act 1967, ss. 20, 30(5)
Rules of the High Court 1980, O. 18 rr. 7(1), 8(1)

For the appellant - K Chandra; M/s K Chandra & Co
For the respondent - Suganthi Singam; M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Judicial Review No: R2-25-74-01]

Reported by Andrew Christopher Simon

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] The appellant ("the employee") appeals to this court against the decision of the Kuala Lumpur High Court in quashing the award of the Industrial Court.

Factual Background

[2] The employee joined the respondent ("the company") on 28 September 1983 as a junior receptionist at a salary of RM155 per month.

[3] She was promoted as senior receptionist on 27 August 1984 and then as front office executive with effect from 16 May 1991.

[4] On 1 March 1997, the employee was transferred to the company's Dulang Coffee House as an executive under the Food & Beverage (F&B) Department *vide* letter dated 27 February 1997. Her last drawn salary was RM1,659 per month. The employee objected to the transfer on the ground that she had no experience or knowledge of food and beverage. However, she reported for duty under protest.

[5] When the employee was in the front office, she had been challenging the company's warning letters given to her for habitually arriving late for work and failure to promptly submit medical chits for medical leave. Be that as it may, she complained that, unlike other employees, she was not given the annual increment for the year 1997; and she was given a one-month bonus, while other employees were given two months.

[6] After the employee's transfer to the F & B Department, the company gave her the job specifications, dated 11 March 1997, which include, *inter alia*, the following:

A You are to ensure that you and your staff are well groomed reporting for duty. Personal grooming is of utmost importance and all staff should be in well-dressed attire.

[7] Subsequently, the F & B manager sent the employee a memo dated 12 March 1997 whereby the employee was directed to wear B uniform, and, for that purpose, the company gave her two skirts, one jacket and one white blouse.

[8] The employee, apparently dissatisfied, alleged that other female executives in the F & B Department did not have to wear C uniforms and that she was the only executive who had been asked to do so.

[9] The F & B manager then issued a memo dated 20 March 1997, requiring the employee to wear a collared white blouse and a D bow tie. The employee alleged that the F & B manager was degrading the employee's position as an executive to that of a waitress, claiming that in the company, only waiters and waitresses wear bow ties. Under protest, the employee wore the uniform and the bow tie, except when she lent the bow tie to other staff. By E letter dated 1 August 1997, the F&B manager gave the employee a warning, for not wearing a bow tie. In reply, the employee claimed that she did wear a bow tie.

[10] The company suspended the employee from work, with effect F from 17 August 1997, pending domestic inquiry into five charges against her.

[11] Charge (3) was subsequently dropped. The employee was found guilty of the other four charges, the particulars of which are as follows:

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Charge (1) In total defiance of the instruction and warning issued on 20 March 1977 by the superior, Mr. Vincent Nonis, and refusal to wear a collared white shirt and a bow tie.

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Charge (2) Wilfully and without lawful excuse, habitually reported late for work in spite of numerous warnings.

Charge (3) (Dropped)

I Charge (4) and (5): Failure to promptly submit medical chits for medical leave.

[12] After the domestic inquiry, the employee was dismissed with effect from 28 August 1997. A

[13] The dismissal was referred to the Industrial Court which found that the employee was dismissed without just cause or excuse. The Industrial Court award was quashed by the High Court by way of an order of *certiorari.* B

[14] After hearing the employee's appeal, we found that the High Court had correctly quashed the Industrial Court award. We dismissed the employee's appeal with costs. Our grounds now follow. C

Victimization: Not Pleaded And Not Proved

[15] The employee's learned counsel Mr K Chandra submitted that the learned judge erred in law and in fact in holding that the Industrial Court had relied on the unpleaded issue of victimization. D He referred to *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 1 CLJ 681 CA; and the provisions of equity and good conscience under s. 30(5) of the Industrial Relations Act 1967. (A reference hereinafter to a section is a reference to that section in the Industrial Relations Act 1967). E

[16] Ms Suganthi Singam, the company's learned counsel, argued that the learned judge was correct in holding that the Industrial Court had erroneously decided on the issue of victimization which is neither pleaded nor supported by evidence. She stressed that F parties are bound by their pleadings, to which the Industrial Court must confine itself. Support was sought in:

(1) *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147,162 FC;

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(2) *Kumpulan Perangsang Selangor Bhd v. Zaid bin Mohd Noh* [1997] 2 CLJ 11 CA; and

(3) Rule 9 of the Industrial Court Rules 1967 ("r. 9").

[17] The above contentions flow from two different schools of H thought. The first is reflected in *National Union of Plantation Workers, supra,* cited for the appellant, where para 4 of the statement of case pleaded that the employees' dismissal was without just cause or excuse. The issue of waiver or condonation was not pleaded by the employees. The Industrial Court found in favour of the I

A employees on the ground that there was waiver or condonation, by the company, of the employees' absence from work. The High Court held that the Industrial Court had arrived at its finding based on an unfounded assumption, without any evidence to that effect. In relation to the company's contention that the issue of waiver or
B condonation has not been pleaded in the statement of case, and should not be considered, this court held that even if the issue of condonation was not specifically pleaded, it was fully argued in the Industrial Court and the High Court without any objection and so it would be too late in the day for the company to contend that
C this issue could not be relied on by the employees.

[18] *National Union of Plantation Workers, supra,* had followed the judgment of the (then) Supreme Court in *Superintendent of Lands And Surveys (4th Div.) & Anor v. Hamit bin Matusin & Ors* [1994] 3
D CLJ 567 which dealt with a "small point of practice and procedure relating to evidence at variance with or departing from pleading". The respective defence of the defendants did not particularise the reason for denying the allegations that the plaintiffs have acquired customary rights. In the final submissions, after the conclusion of
E all evidence, an objection was raised by the plaintiffs for the first time that such defences were not pleaded. The learned trial judge invoked O. 18 rr. 7(1) and 8(1) of the Rules of the High Court 1980 and sustained the plaintiffs' objection. On appeal, the (then) Supreme Court disagreed and held in essence that:

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(1) When evidence represented a departure from the pleadings, it should be objected to when and where it was adduced and it would be too late when it was objected to later on in the final submission at the close of the evidence; and

G (2) Evidence bearing on the two alleged defences was not such a radical departure but a mere development of what had been alleged by the defendants.

[19] Our analysis of the judgment in *Superintendent of Lands &*
H *Mines, supra,* shows that it was not concerned with the construction of s. 30(5) and r. 9, *supra*. Instead, it revolves around the procedure generally applicable to ordinary civil litigation. It does not relate to the specialized domain of industrial jurisprudence.

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[20] With particular reference to industrial jurisprudence, there are two weighty authorities, of the (then) apex court, which reflect the second school of thought, and at variance with the approach adopted in *National Union of Plantation Workers, supra.* The first is *R Rama Chandran, supra,* where the Industrial Court did not consider the issues raised in the parties' pleadings. At p. 162 b-e, Eusoff Chin CJ (Malaysia) (as he then was) set out the relevant principle as follows:

> It is trite law that a party is bound by its pleadings. The Industrial Court must scruntinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgement having strict regards to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil Court (s. 30 of the Industrial Relations Act 1967) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must all times keep itself alert to the issues and attend to matters it is bound to consider.

[21] The second authority was established by another coram of the (then) Supreme Court in *Kumpulan Perangsang Selangor Bhd, supra,* which followed the principle propounded in *R Rama Chandran, supra.* There, the Industrial Court had acted on a ground which was not advanced in the pleaded case. The award by the Industrial Court was quashed: per Gopal Sri Ram JCA (now FCJ) speaking for the (then) Supreme Court.

[22] The existence of the two different schools of thought makes it imperative for us to indicate our choice for the better view. With respect, we subscribe to and agree with the principle propounded in the second school of thought which sets out the correct judicial approach relating to the specialized domain of industrial jurisprudence.

[23] In our view, the Industrial Court's duty, to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form under s. 30(5), does not give the Industrial Court the carte blanche to simply ignore the Industrial Court Rules 1967 made under the principal Act. Section

A 30(5) merely allows the Industrial Court to disregard technicalities and legal form eg, Form H contained in r. 9(1) which merits reproduction as follows:

Statement of Case

B (1) Upon a case being brought before the Court, the Registrar shall immediately serve notice in Form H on one or other of the parties as the President shall direct to submit to the Court a Statement of Case.

C **[24]** By way of contrast, r. 9(3) specifically prescribes the contents of a statement of case. These contents are certainly matters of substance. It reads:

(3) Such Statement of Case shall be confined to the issues which are included in the case referred to the Court by the Minister or in
D the matter required to be determined by the Court under the provisions of the Act and shall contain:

(a) a statement of all relevant facts and arguments;

(b) particulars of decisions prayed for;

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(c) an endorsement of the name of the first party and of the first party and of his address for service; and

(d) as an appendix or attachment, a bundle of all relevant documents relating to the case.

F **[25]** The importance of the employee's statement of case pleaded in the Industrial Court makes it immensely important for us to reproduce it *in extenso* as follows:

Statement Of Case

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1. The parties to the dispute are Hotel Excelsior (M) Sdn Bhd (hereinafter referred to as "the Company") and Ranjit Kaur A/P Gopal Singh (hereinafter referred to as "the Claimant") who joined the services of the Company on the 27th September 1983.

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2. The dispute is over the dismissal of the Claimant from the services of the Company as its F&B Executive. The Claimant's last drawn salary was RM1,659 per month.

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3.1. The Claimant joined the Company as a Receptionist and from May 1991 the Claimant was promoted as the Company's Front Office Executive until February 1997. By letter dated 27th February 1997 the Claimant was "transferred" in the F&B Department as the F&B Executive.

3.2. The Claimant protested at this purported transfer both orally and in writing the following day but reported for work in the new post under protest.

3.3. Subsequent to this there was an exchange of correspondence between the Claimant and the Company on alleged matters like uniform, medical leave and insubordination.

3.4. By letter dated 17th August 1997 the Company preferred 5 charges against the Claimant and purported to hold an inquiry on 23rd August 1997.

3.5. By letter dated 28th August 1997 the Company summarily dismissed the Claimant with effect from the same date. A copy of this letter is annexed hereto marked "C.1".

3.6. The Claimant states that her purported transfer to Front Office and the subsequent events leading to her dismissal were actuated by *mala fides*, and was an unfair labour practice.

4. The Claimant therefore contends and will contend at this hearing that the said dismissal is without any or any just cause or excuse.

5. Further or in the alternative the Claimant will contend that the said dismissal is contrary to the principles of natural justice, equity, good conscience and an unfair labour practice which ought to be struck down as such by the Court.

6. The Claimant therefore prays for reinstatement to her former position in the company as Front Office Executive without loss of any benefits monetary or otherwise whatsoever.

[26] A plain reading of the statement of case reveals that the issue of victimization was never pleaded at all. For all intents and purposes, in the Industrial Court, this unpleaded issue does not appear to be within the contemplation of the employee.

[27] Quite apart from the pleading, a close scrutiny of the Industrial Court award shows that there was no evidence to support the unpleaded issue of victimization. At p. 409 of the appeal record, the Industrial Court concluded as follows:

> **This Court of course cannot uphold a plea of victimization in the absence of positive proof** but as Court of social justice it is bound to give due consideration to the **possibility of victimization** and should any doubt arise it should give the benefit of the doubt to the employee after taking into consideration the whole of the evidence and the particular circumstances surrounding each case. (emphasis added)

[28] On the basis of this specific conclusion by the Industrial Court, in relation to the unpleaded issue of victimization for which there was no positive proof, we are of the view that the Industrial Court had gone on a frolic of its own in finding that the employee had been victimized. It is manifestly wrong for the Industrial Court to proceed to embark on "the possibility of victimization" when it should have been concerned with probabilities ie, on a balance of probabilities. This principle setting out the standard of proof is both fundamental and elementary.

[29] The Industrial Court has clearly occasioned three specific jurisdictional errors *viz* (1) acting on the unpleaded issue of victimization; (2) finding the possibility of victimization in the absence of positive proof; and (3) misdirecting on the standard of proof by reference to possibility instead of a balance of probabilities. Such obvious jurisdictional errors of the Industrial Court render its award legally unsustainable, and as a consequence, amenable to judicial review by way of an order of *certiorari*.

Conclusion

[30] In the circumstances, we dismissed the employee's appeal with costs, and affirmed decision of the High Court. Deposit to the company (respondent) on account of the costs.

[31] My learned brother Abdul Malik Ishak JCA has also prepared his judgment in support of mine.

Abdul Malik Ishak JCA:

[32] This is my supporting judgment to that of my learned brother Low Hop Bing, JCA who has lucidly set out the facts *in extenso* in his well written judgment and I need not dwell on the facts except when the occasion calls for it.

[33] By way of a representation under s. 20 of the Industrial Relations Act 1967, the appellant employee's matter was referred to the Industrial Court for adjudication. The Industrial Court heard the matter and held that the appellant employee had been dismissed without cause or excuse. The respondent employer was ordered to pay back wages in the sum of RM42,304.50 and compensation *in lieu* of reinstatement in the sum of RM21,567.

[34] Aggrieved by the decision of the Industrial Court, the respondent employer filed a judicial review proceeding to quash the said award. The High Court after hearing arguments held that the Industrial Court had erred in law and/or had acted in excess of its jurisdiction by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration, and had failed to consider the pleadings of the parties, and had mis-directed itself by asking the wrong questions in handing down its award. Consequently, the High Court quashed the said award. This prompted the appellant employee to file an appeal to this court.

[35] This court has said in *Ahmad Jefri bin Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 6 CLJ 473 that:

> The court's sole function in judicial review proceedings had always been to scrutinise the decision making process and not to question the decision itself. The accepted legal position in England, Hong Kong and Malaysia was to quash the decisions and thereafter to remit the cases to the original decision maker to reconsider the matter. However, in recent years the Malaysian courts have become bold with regard to hitherto accepted principles relating to judicial review in that they have questioned not only the process but also the decision itself and where necessary substituted their own views for those of the decision maker. In short the Malaysian courts have not stopped at quashing and remitting the case back to the decision maker but have assumed the jurisdiction to proceed ahead and take the bold step of granting the consequential relief, which practice is endorsed as necessary to meet the ends of justice.

[36] Incidentally, the same case was also reported in two other popular local law journals which carried the following citations: [2008] 6 AMR 190 and [2008] 6 CLJ 473.

[37] It goes without saying that the High Court had rightly exercised its judicial review powers according to the law and had rightly quashed the award of the Industrial Court.

[38] When the Industrial Court took into consideration the issue of victimisation, that was done without regard to the fact that it was not pleaded nor proved. The appellant employee did not rely on the issue of victimisation as a basis for her termination. In considering whether there was victimisation, the Industrial Court had erroneously relied on an unpleaded fact. The appellant employee's statement of claim did not plead victimisation nor did it make any reference to the particulars or details of victimisation.

[39] It is a correct statement of the law to say and I so say that the practice of the courts is to consider and deal with the legal result of the pleaded facts although the particular legal result may not be stated in the pleading (*Koh Siak Poo v. Sayang Plantation Bhd* [2002] 1 CLJ 501, CA; *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; and *Lever Brothers, Limited, And Others v. Bell And Another* [1931] 1 KB 557). Of course, of utmost importance is the principle that the parties are bound by their pleadings. What this means is this. That the court is not entitled to decide a suit on a matter which is not pleaded and that the trial of the suit is solely confined to the pleadings (*Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330).

[40] Generally, pleadings operate to define and delimit with absolute clarity and precision the real matters in controversy between the parties. This would enable the parties to prepare their respective cases and the court too will be able to adjudicate the case with ease (*S Manickam & Ors v. Ismail bin Mohamad & Ors* [1996] 1 LNS 117; *Narayanan Ponnusamy v. Kannamah Ponnusamy* [1993] 4 CLJ 389; and *Anjalai Ammal & Anor v. Abdul Kareem* [1968] 1 LNS 8).

[41] The right to be informed of any adverse point so that the other side has the opportunity of rebutting it gives rise to the fundamental rule of natural justice (*Muniandy & Anor v. Muhammad Abdul Kader Muhd Saheed & Ors* [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116; *Wisma Punca Emas Sdn. Bhd. v. Dr. Donal R. O'Holohan* [1986] 1 LNS 46; *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102; and *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476). According to the case of *The Chartered Bank v. Yong Chan* [1974] 1 LNS 178 as well as the case of *Ria Enterprise & Ors v. MBF Finance Bhd* [2001] 1 CLJ 687, any judgment decided on an issue that was not raised in the pleadings, that judgment can be set aside and a new trial ordered.

[42] In regard to the objects of pleadings, Buhagiar J, in *Wong See Leng v. C. Saraswathy Ammal* [1954] 1 LNS 133 had this to say: A

> Now as stated in *Bullen and Leake's Precedents, of Pleadings*, 10th Edition page 1:
>
> The principal objects of pleadings are firstly, to define the issues of fact and questions of law to be decided between the parties; secondly, to give to each of them distinct notice of the case intended to be set up by the other and thus to prevent either party from being taken by surprise at the trial; and thirdly, to provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and defence may be easily apprehended, and constitute a permanent record of the questions raised in the action, and of issues decided therein, so as to prevent future litigation upon matters already adjudicated upon between the litigants.

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[43] In the absence of pleadings, evidence if any produced by the parties cannot be considered by the court and no party should be permitted to travel beyond its pleadings. All the necessary and material facts should be pleaded by the party in support of the case set up by the said party (*Ram Sarup Gupta (dead) by L. Rs. v. Bishun Narain Inter College and others*, AIR [1987] SC 1242; and *K. Kanakarathnam v. A. Perumal and another*, AIR [1994] Mad. 247). According to the case of *Hari Chand v. Daulat Ram*, AIR [1987] SC 94, no evidence can be led on a fact not pleaded. Neither is it open to the parties to give up its case set out in the pleadings and propound an entirely new and different case (*Vinod Kumar Arora v. Smt. Surjit Kaur*, AIR [1987] SC 2179 at 2183). E F

[44] Additionally, r. 9 of the Industrial Court Rules 1967 supports the proposition that all relevant facts must be contained in the statement of case. Here, there was a glaring absence of any pleaded facts relating to the disparity in the payment of bonus in order to give rise to a claim of victimisation and neither was there a failure to reply to the appellant employee's letter that would amount to victimisation. At any rate, the discretion to pay the bonus can never amount to victimisation. G H

[45] Since the issue of victimisation ought not to be considered by the Industrial Court, I am of the considered view that the High Court had acted within its jurisdiction in issuing an order of *certiorari* to quash the decision of the Industrial Court. I

[46] Next, the subject matter of the first charge was whether the appellant employee had defied the instructions to use a collared white shirt and bow tie despite a warning issued on 20 March 1997 by the appellant employee's superior. That being the case, any consideration as to whether the appellant employee's superior or any other individual was required to wear such an attire was entirely irrelevant.

[47] It must be noted that the High Court had correctly held that the Industrial Court's consideration as to whether the appellant employee's superior was required to wear a bow tie was an irrelevant consideration bearing in mind that there was evidence before the Industrial Court that the appellant employee's superior had given verbal as well as written instructions by way of memorandums dated 20 March 1997 and 1 August 1997 to be attired in proper uniform. But, unfortunately the appellant employee remained recalcitrant.

[48] On the available evidence, the decision of the Industrial Court was misplaced and erroneous when it placed reliance on the attire of the appellant employee's superior as justification in respect of the appellant employee's refusal to use the bow tie.

[49] There was also evidence to show that the appellant employee had admitted that she did not wear the bow tie as directed on some occasions and that when she lent her bow tie to her staff who did not bring their bow tie, she would instead be wearing a round necked white blouse. Such an admission by the appellant employee clearly contravened the directive to use a collared white shirt. The compelling evidence clearly justified the High Court to issue an order of *certiorari*. The decision of the Industrial Court suffers from a serious jurisdictional defect and is a nullity in law. The High Court was correct in quashing the award of the Industrial Court.

[50] Next, the Industrial Court held that there was a need for the production of the operations report to show the dates when the appellant employee was late for work despite the production of the appellant employee's punch cards as evidence. In arriving at such a conclusion, the Industrial Court had failed to have regard to the fact that the appellant employee had not objected to the dates and times that were the subject matter of the charge and that the punch cards of the appellant employee had already been produced.

[51] The appellant employee held the view that if she left her place of employment late, she was entitled to come late. So, the operations report would not have served any purpose at all because the appellant employee did not dispute that she came late and that she had excuses to do so. Consequently, the Industrial Court had erroneously invoked s. 114(g) of the Evidence Act 1950.

[52] Next, the Industrial Court also concluded that the respondent employer was practising double standards in electing to punish the appellant employee and not another and for that reason the Industrial Court held that the respondent employer had acted unreasonably. But, sad to say, this was not the issue that was raised by the appellant employee in the pleadings and so it was an irrelevant consideration. It must be borne in mind that irrespective of whether or not the respondent employer chose to discipline another individual this did not absolve the appellant employee from her misconduct. The High Court was correct in issuing an order of *certiorari* because it was not for the appellant employee to question the respondent employer's election of whom to discipline.

[53] Next, in regard to the Industrial Court's conclusion that the respondent employer had condoned the appellant employee's conduct, this was in direct contradiction to the evidence which was led before the Industrial Court. The respondent employer's witness had given evidence that he had not been aware of the appellant employee's late coming to work in March to June 1997 and that it was only in July 1997 that the respondent employer learnt of the full extent of the appellant employee's absence from work. For these reasons, the High Court was correct in holding that the Industrial Court had misapplied the doctrine of condonation because condonation would only come into play if the respondent employer had been fully aware of the appellant employee's late coming to work and nonetheless elected to do nothing about it. Here, the respondent employer had adduced evidence to show that the appellant employee had been warned about her conduct in coming to work late. Thus, the erroneous application of the doctrine of condonation by the Industrial Court amounted to an error of law that entitled the High Court to make an order of *certiorari*.

[54] I have this to say in regard to the doctrine of condonation. It has its origins in the common law (*Phillips v. Foxall* [1871-72] 7 LR QB 666 at p. 680; and *Beattie v. Parmenter* [1888-89] 5 TLR 396 at p. 397). It has been applied in India (*L. W. Middleton v. Harry*

Playfair AIR [1925] Calcutta 87 at p. 92). Our courts too have applied it (*The Manager, Scudai Estate, Johore Bahru v. Narayanan* [1960] 1 LNS 149). New Zealand Courts also applied the doctrine vigorously (*Clouston & Co., Limited v. Corry* [1906] AC 122 (CA)). Likewise it has been applied in Canada (*Lucas v. Premier Motors Ltd.* [1928] 4 DLR 526) as well as in South Africa (*The Federal Supply And Cold Storage Company Of South Africa (Limited) v. Angehrn And Piel* [1909-1910] 26 LT 626). It has also been applied in Australia (*Meyrick v. Stirling Bros., Limited* [1899-1901] 1-3 WAR 51). And Hong Kong too has applied it (*Yeung Chee-Kiu v. Lam Chee Trading As Yau Fat Furniture Co.* [1966] HKD CLR 65 at p. 68).

[55] The doctrine of condonation is often associated and designated as a waiver.

[56] From the long line of authorities, condonation is essentially the employer excusing the employee and dispensing with the employer's right to punish the employee for misconduct or breach of a duty by an employee. However, an employer cannot, at any time after the employer has condoned the offence, punish the employee for that offence provided the employee does not repeat the offence. If the employee repeats the offence, the condoned offence revives and the employee can be punished for it.

[57] Again from the long line of authorities, the following principles of condonation can be distilled. The doctrine of condonation is enforceable for this simple reason. It prevents an employer from punishing an employee for a breach of a contractual duty that the employer has condoned and this flows from the argument that it is unconscionable or inequitable for the employer to be permitted to deny the effect of the employer's words or conduct. The starting point of this argument begins with the case of *Central London Property Trust Limited v. High Trees House Limited* [1947] 1 KB 130 and culminating in the case of *Bremer Handelsgesell-Schaft Schaft M.B.H. v. Vanden Avenne-Izegem P.V.B.A.* [1978] 2 Lloyd's Rep 109.

[58] The employee is entitled by virtue of the doctrine of condonation to plead the employer's abandonment of the employer's contractual right to discipline the employee by way of confession and avoidance if the employer attempts to subsequently reassert that right (per Lord Hailsham of Marylebone LC in *Banning v. Wright (Inspector of Taxes)* [1972] 1 WLR 972 at p. 975). But if the employee repeats the offence, the employer is entitled to discipline and punish the employee.

[59] The long line of authorities also say that condonation can only arise after the employer acquires full knowledge of the nature and circumstances of an employee's offence. It must be borne in mind that an employer cannot waive the contractual right to discipline an employee if the employer is not aware that such a right has accrued to the employer. Here, the respondent employer only became aware of the appellant employee's late coming to work in July 1997 and not in March to June 1997 as alleged. Consequently, the doctrine of condonation cannot be invoked to the detriment of the respondent employer. The High Court was right when it quashed the award of the Industrial Court.

[60] Finally, I have this to say. The High Court was correct in holding that the Industrial Court had asked itself the wrong question when faced with a representation pursuant to s. 20 of the Industrial Relations Act 1967. Pursuant to that representation, the function of the Industrial Court was to determine whether the misconduct committed by the appellant employee had been established by the respondent employer. Raja Azlan Shah CJ. (Malaya) (as His Majesty then was) explained the correct approach in *Goon Kwee Phoy v. J. & P. Coats (M) Bhd.* [1981] 1 LNS 30 in this way:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

[61] Mohamed Azmi FCJ, delivering the grounds of judgment for the Federal Court in *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449, FC, aptly sets out the function of the Industrial Court in a reference under s. 20 of the Industrial Relations Act 1967 in this manner:

> As pointed out by this court recently in *Wong Yuen Hock v. Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under section 20 is two fold, first, to determine whether the misconduct complained

A of by the employer has been established, and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error which would merit interference by *certiorari* by the High Court.

B **[62]** It goes without saying that I must now make those orders made by my learned brother Low Hop Bing, JCA.

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